Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements	WC Docket No. 02-112

REPLY COMMENTS OF BELLSOUTH CORPORATION

BELLSOUTH CORPORATION

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BellSouth Corporation, on behalf of itself and its wholly owned subsidiaries (collectively "BellSouth"), hereby submits these reply comments in the above-captioned proceeding.[1] As demonstrated more fully herein, the record does not establish a compelling reason to continue the structural separation and other Section 272 requirements beyond the statutory three-year period. Accordingly, BellSouth urges the Commission to allow the Section 272 obligations to sunset three years after a Bell Operating Company ("BOC") receives authority to provide in-region, interLATA telecommunications services as envisioned by Congress.

I. INTRODUCTION AND SUMMARY

The three-year anniversary of the first grant of long distance authority to a BOC is rapidly approaching. Based on the evidence in the record, there is no compelling reason to extend the structural and nondiscrimination requirements of Section 272 beyond the statutory three-year period. Commenters' claims of cost misallocation, discrimination, and other alleged

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1 *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112, *Notice of Proposed Rulemaking*, FCC 02-148 (rel. May 24, 2002) (*"NPRM"*).

BOC abuses are nothing more than unsubstantiated allegations intended to goad the Commission into retaining the separate affiliate requirements. Commenters such as AT&T, recognizing the weaknesses in their arguments, devote a significant amount of text trying to persuade the Commission to consider all types of evidence of discrimination and cross-subsidization – no matter how unsubstantiated, misleading, exaggerated, or inaccurate those allegations are.[2] The Commission should not be pressured into retaining unnecessary regulation when there is no sufficient justification for doing so. Indeed, BellSouth cautions the Commission against the obvious reflex simply to extend all of the Section 272 obligations in light of the current challenges plaguing the entire telecommunications industry.

The Commission has a statutory obligation to allow the Section 272 requirements to expire three years after a BOC obtains long distance relief in the absence of substantial and compelling evidence to justify the retention of these requirements. Accounting improprieties by companies such as WorldCom, unsubstantiated allegations of BOC discrimination, claims of hypothetical future misconduct by BOCs, the need for two biennial audits, or the lack of performance measures are all insufficient reasons to extend the application of the separate affiliate requirements.

Accordingly, BellSouth urges the Commission to reject proposals seeking to extend the structural and nondiscrimination provisions of Section 272 for any length of time beyond the statutory three-year period (*e.g.*, one year, three years, indefinitely).[3] Continuing these

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[2] *See* AT&T Comments at 21-24.

[3] *See, e.g.*, AT&T Comments at 7 (extend three years); CompTel Comments at 2 (extend three to five years); Focal Communications Corp., Pac-West Telecomm, Inc., and US LEC Corp. Comments ("Focal, *et al.*,") at 6 (extend "for the foreseeable future"); Public Service Commission of the State of Missouri ("Missouri PSC") Comments at 4; Pennsylvania Public

requirements would advance no legitimate interest, would impose unnecessary and burdensome costs on BOCs, and would deprive consumers of innovative and competitive service offerings. Moreover, the Commission should not adopt additional regulation as part of the Section 272 framework. Mandating performance measures for special access or unbundled network elements ("UNEs") as part of Section 272 compliance would exceed the scope of the Act. In addition, requiring BOCs to prove that they lack market power as a prerequisite to the sunset is beyond the scope of Section 272. The record is clear – the Commission should allow the separate affiliate requirements to sunset after the three-year statutory period as envisioned by Congress.

II. THE RECORD IS CLEAR THAT THE ACT REQUIRES THE ELIMINATION OF THE SEPARATE AFFILIATE REQUIREMENTS ON A BOC-BY-BOC BASIS.

A number of parties including BellSouth effectively demonstrate that the Act mandates that the separate affiliate requirements sunset on a BOC-by-BOC basis rather than on a state-by-state basis.[4] Even Sprint recognizes that the plain language of the Act does not support a state-by-state approach.[5] However, Sprint goes beyond the scope of Section 272 when it suggests that the Commission extend the separate affiliate requirements until after a BOC receives long distance authority in its last state.[6] This interpretation is overbroad and inconsistent with the plain language of the statute.

Utility Commission ("PA PUC") Comments at 5; Public Utility Commission of Texas ("Texas PUC") Comments at 2.

[4] *See, e.g.*, BellSouth Comments at 5-9; SBC Comments at 19-21; Sprint Comments at 4-5; United States Telecom Association ("USTA") Comments at 4-6; Verizon Comments at 3-5.

[5] *See* Sprint Comments at 4-5.

[6] *See* Sprint Comments at 1, 3.

Section 272 does not tie the sunset of the separate affiliate requirements to long distance approval in the last state within a BOC's region. To the contrary, explicit in the statute is the requirement that, in the absence of Commission action, the separate affiliate requirements sunset "*3 years after the date such Bell operating company or any Bell operating company affiliate is authorized to provide interLATA telecommunications services* under section 271(d)."[7] As the United States Telecom Association ("USTA") points out, "a logical reading of Section 272(f)(1), particularly considering the legislative history of the 1996 Act, is that a BOC's separate affiliate obligations terminate for the whole region in which it provides services, three years after the date for the first state in which that BOC obtains Section 271 authority."[8] It is incongruous to interpret the sunset provision as requiring the continuation of the Section 272 obligations until long distance relief is obtained in a BOC's last state. Even Sprint wisely refrains from asserting that the plain text of Section 272 conditions the expiration of the separate affiliate requirements upon receipt of long distance relief in a BOC's last state.

Established rules of statutory construction mandate that the Commission follow the express language of Section 272. The statute does not say that the Section 272 separate affiliate requirements will sunset on a state-by-state basis or that the sunset should occur only after a BOC receives authority to offer in-region long distance services in is last state. Rather, Section 272 requires the separate affiliate requirements to sunset three years after a BOC receives Section 271 authority (unless the Commission has a compelling reason to extend). Implicit in

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[7] 47 U.S.C. § 272(f)(1) (emphasis added).

[8] USTA Comments at 6 (emphasis added).

this mandated sunset is Congress's conclusion that the separate affiliate requirements would expire after a BOC receives Section 271 relief in the first state within its region. This is the only interpretation permitted by the plain language of the Act.

As the record demonstrates, when Congress desired to place conditions or particular limitations on a sunset, it expressly did so. When it wanted to restrict the sunset of certain provisions to a particular local market or state, it included language to that effect.[9] Section 272(f)(1) contains no such language; therefore, it is clear that Congress intended the separate affiliate requirements to sunset on a BOC-by-BOC basis, not a state-by-state basis. Moreover, the Act calls for the expiration of the Section 272 prohibitions after a BOC obtains long distance relief in its first state.

III. IMPOSING PERFORMANCE MEASURES AS PART OF SECTION 272 COMPLIANCE WOULD EXCEED THE SCOPE OF THE ACT.

Several parties urge the Commission to adopt performance measures and standards for special access services and UNEs either in lieu of, or in addition to, the separate affiliate requirements.[10] These proponents of performance measures argue that such tools are necessary to prevent discrimination by BOCs.[11] As an initial matter, the propriety of performance measures for both special access services and UNEs is being decided in two separate

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[9] *See, e.g.,* BellSouth Comments at 6-9; SBC Comments at 19-20; USTA Comments at 4-6; Verizon Comments at 5.

[10] *See, e.g.,* Association for Local Telecommunications Services ("ALTS") Comments at 3; Covad Comments at 3; Focal, *et al.* Comments at 6-7; Sprint Comments at 3, 12; Time Warner Telecom ("Time Warner") Comments at 25-27; WorldCom Comments at 10-12.

[11] ALTS Comments at 1, 3; Sprint Comments at 12; Time Warner Comments at 4, 9-11.

proceedings.[12] BellSouth urges the Commission to engage in independent decisionmaking in the instant rulemaking. The decision whether to adopt performance measures for special access or UNEs has absolutely no bearing on whether to allow the separate affiliate requirements to sunset. More importantly, there is no statutory basis for tying the sunset of the Section 272 restrictions to the implementation of performance measures. Nowhere in Section 272 does Congress mention performance measures as a Section 272 compliance mechanism. The structural separation and nondiscrimination requirements set forth in Section 272 are complete unto themselves. Thus, the Commission should reject requests to adopt performance measures either in conjunction with, or in lieu of, the separate affiliate requirements.

Regarding special access, commenters grossly exaggerate the incentive and ability of BOCs to discriminate in the provision of these interstate access services. For example, AT&T and WorldCom contend that performance measures are necessary to address a pattern of ILEC discrimination in the provisioning and maintenance of special access services.[13] In addition, AT&T and CompTel both assert that receipt of Section 271 relief increases a BOC's incentive to discriminate in the provision of special access services for its retail end users as well as for its BOC affiliate.[14]

These arguments are bogus. All special access customers subscribe to exactly the same service, regardless of their status as a carrier or an end user. It is specious to suggest that ILECs

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[12] *See Performance Measurements and Standards for Interstate Special Access Services, et al.*, CC Docket No. 01-321, *et al.*, *Notice of Proposed Rulemaking*, 16 FCC Rcd 20896 (2001); *Performance Measurements and Standards for Unbundled Network Elements and Interconnection, et al.*, CC Docket No. 01-318, *et al.*, *Notice of Proposed Rulemaking*, 16 FCC Rcd 20641 (2001).

[13] AT&T Comments at 24-29; WorldCom Comments at 10-12.

[14] AT&T Comments at 25; CompTel Comments at 8.

can or do engage in conduct that favors end user special access customers. Such a discriminatory plan would not make any sense. The largest special access customers are carriers. It would be contrary to the financial interest of the ILEC to favor its end user customers over its carrier customers. Apart from the fact that there is no economic incentive to engage in such discriminatory conduct, such conduct could not escape detection. Carriers would quickly discover any preferences that are extended to end user customers exclusively because these same end users are also customers of the carriers. Moreover, the mere suspicion of inappropriate conduct has always been sufficient for carriers to pursue enforcement actions. There is absolutely no reason to believe that carriers would hesitate to file complaints if they believed ILECs were discriminating against them. In summary, phantom allegations of discrimination do not establish a need for performance measures for special access. More importantly, unsubstantiated allegations of discrimination in the provisioning of special access have no bearing on the propriety of allowing the separate affiliate requirements to expire.

CompTel claims that structural separation combined with performance measures make it possible to monitor BOC compliance with the nondiscrimination safeguards in Sections 272(c) and 272(e) as well as identify any preferential treatment obtained by the separate affiliate.[15] This argument is without merit. The type of reporting proposed by the CLECs and IXCs is unwarranted and would be redundant with already existing reports. With respect to special access, BOCS are required to report (ARMIS Report 43-05) average installation intervals, mean time to repair, and percent of commitments met (*i.e.*, commit to a due date and meet that

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[15] *See, e.g.,* CompTel Comments at 16.

committed due date).[16] These data are reported annually and are for the region as a whole. BellSouth's marketing group also provides to most carrier customers reports containing similar information as well as more specific information regarding the special access services provided by BellSouth. This information can easily be used to assess BellSouth's performance. Therefore, no additional performance reports for special access services are necessary.

With respect to performance measures for UNEs, BellSouth has advocated in a separate proceeding the adoption of a mandatory federal plan that includes a streamlined set of measurements.[17] Notwithstanding this support for a uniform federal set of performance measures for UNEs, BellSouth does not believe that the implementation of performance standards for UNEs should have any effect on whether or not to sunset the separate affiliate requirements. Attempts to link the two together must not be allowed.

CLEC arguments regarding the necessity of UNE performance measures to ensure Section 272 compliance are specious. The CLEC community has been advocating the adoption of performance measures for UNEs long before the instant proceeding began. These commenters are merely trying to use the sunset as a carrot for the Commission to mandate performance measures. BellSouth submits that there is no statutory basis for adopting UNE performance measures under Section 272 or making compliance with these measures a prerequisite for sunsetting the separate affiliate requirements. There is absolutely no nexus between the two.

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[16] *See Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, *Memorandum Opinion and Order*, 6 FCC Rcd 2974 (1991) (*"Service Quality Order"*).

[17] *See* BellSouth Comments, CC Docket No. 01-318 (filed Jan. 22, 2002); BellSouth Reply Comments, CC Docket No. 01-318 (filed Feb. 12, 2002).

Contrary to the suggestions of parties such as ALTS, CompTel, and WorldCom, performance measures per se are not mechanisms that identify discrimination. For example, the ARMIS data that BellSouth reports is for BellSouth's nine-state region as a whole. An individual carrier may not do business in all nine states, so the fact that its individual results differ from a regional average does not automatically mean that it was discriminated against. Even if a carrier did business in all nine states and its mix of services were the same as the regional average, its individual performance measure differing from the average in and of itself does not indicate per se discrimination. An average by definition has performance levels that are above and below the average. Performance measures, or differences in performance measures, are not per se indicia of preferential treatment.

Clearly, performance measures do not measure discrimination as suggested by some commenters. Rather, they provide competitors with a regulatory advantage that translates into a competitive advantage by saddling only the BOCs with reporting burdens. Moreover, as BellSouth and others have repeatedly indicated, carriers with claims of discrimination may seek relief through the complaint process. The appropriate forum to resolve disputes regarding the provisioning of special access services or UNEs is through the Commission's or a state's enforcement process. Indeed, as the Commission has stated, "to the extent that parties are experiencing delays in the provisioning of special access services ordered from [BOCs'] federal tariffs, we note that these issues are appropriately addressed in the Commission's section 208 complaint process."[18] As the foregoing demonstrates, mandated performance measures as a part

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[18] *Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953, 4127, ¶ 341 (1999) ("*Bell Atlantic New York Order*").

of, or in lieu of, Section 272 obligations are inconsistent with the statute and do not measure discrimination per se as suggested by CLECs and IXCs.

IV. REQUIRING A BOC TO PROVE A LACK OF MARKET POWER AS A CONDITION OF RELIEF FROM THE SEPARATE AFFILIATE REQUIREMENTS IS BEYOND THE SCOPE OF SECTION 272.

The Commission must deny proposals seeking to require a BOC to demonstrate that it lacks market power in order to obtain relief from the Section 272 obligations.[19] Such a requirement would be wholly inconsistent with the plain language of the statute. Nowhere in Section 272 did Congress mandate that a BOC demonstrate that it lacks market power as a condition of allowing the separate affiliate requirements to sunset. Had Congress intended to condition the expiration of the Section 272 obligations on a BOC's loss of market share, it would have expressly included such a requirement.

In other contexts, when Congress wanted the Commission in prescribing rules to consider the market power of an entity, it expressly included language to that effect. For example, Section 533 of the Act expressly authorizes the Commission to adopt rules and regulations that "take particular account of the *market structure*, ownership patterns, and other relationships of the cable television industry, including the nature and *market power* of the local franchise."[20] Clearly, the statute directs the Commission to consider market structure and market power in promulgating rules for the cable industry. Section 272, however, contains no language instructing the Commission to analyze a BOC's market power prior to sunsetting the separate affiliate requirements. Therefore, the Commission may not require BOCs to demonstrate a lack

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[19] *See, e.g.*, Comments of the New Jersey Division of the Ratepayer Advocate at 4-6; AT&T Comments at 4; WorldCom Comments at 2.

[20] 47 U.S.C. § 533(f)(2)(C) (emphasis added).

of market power or a loss of market share as a predicate to allowing the Section 272 obligations to expire.

As BellSouth demonstrated in its comments and AT&T's expert agrees, even Section 271 does not require competitors to capture a certain market share or competition to occur at a certain rate before a BOC is authorized to provide long distance service.[21] Rather the relevant test is whether the BOC has opened its local markets to competition. As the Commission has appropriately recognized, "Congress specifically declined to adopt a market share or other similar test for BOC entry into long distance."[22] The same is true for Section 272. Congress did not establish a market share test for sunset of the Section 272 restrictions. Therefore, imposing such a requirement would exceed the scope of the statute.

Clearly, there is neither a statutory basis nor a need for the Commission to examine the competitive landscape under Section 272. Section 272 allows the separate affiliate requirements and related safeguards to sunset three years after a BOC receives Section 271 relief. Nowhere in Section 272 is there a requirement that the BOC prove that competition is continuing to grow or has reached a certain level before it can be relieved of the separate affiliate requirements. The Act does not state that when a BOC loses market share or is declared non-dominant in the provision of local exchange services, the Section 272 restrictions should sunset. Congress never expressed this view, either in the Act or the legislative history. Accordingly, the Commission may not condition the expiration of the Section 272 requirements on the state of the marketplace.

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[21] BellSouth Comments at 15; Declaration of Lee Selwyn, Attachment to AT&T Comments, at 11-12 ("Selwyn Declaration").

[22] *See Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., And BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services In Georgia and Louisiana*, CC Docket No. 02-35, *Memorandum Opinion and Order*, FCC 02-147, ¶ 14 & n.37

Moreover, as discussed more fully below, a market share analysis has its limitations. In an affidavit submitted as part of BellSouth's Section 271 Application for Georgia and Louisiana, William E. Taylor effectively demonstrates the flaws in relying solely on a market share analysis to determine whether a BOC is engaging in anticompetitive activities.[23] According to Dr. Taylor, market share analysis says nothing about a BOC's actual or expected market conduct.[24] Therefore, arguments seeking to condition the expiration of the Section 272 obligations on such an analysis should be rejected.

AT&T asserts that "[i]n evaluating whether to allow the section 272 requirements to sunset, therefore, the core consideration, as it was when section 272 was enacted, must be market power."[25] According to AT&T, "it is critical that the Commission continue to apply section 272 and other regulatory safeguards to help detect and discourage such anticompetitive conduct."[26]

As Dr. Taylor explains, economists define market power as the ability of a firm to raise and maintain the market price above competitive levels for a prolonged period of time.[27] According to Dr. Taylor, the problem with "market share analysis is that it fails to recognize that there is no magic number or level to which the incumbent firm's market share must fall before

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(rel. May 15, 2002) (citing *Sprint v. FCC,* 274 F.3d at 553-54 (stating that "the statute imposes no volume requirements for satisfaction of Track A.").

[23] *See* Reply Affidavit of William E. Taylor, Attachment to Reply in Support of Application by BellSouth for Provision of In-Region, InterLATA Services in Georgia and Louisiana, CC Docket No. 01-277 (filed Nov. 13, 2001) ("Taylor Affidavit").

[24] *Id.* at 43.

[25] AT&T Comments at 10.

[26] *Id.* at 14.

[27] Taylor Affidavit at 44.

the process of competition that is underway can be declared to be beyond harm's reach."[28] More importantly, Section 272 itself does not contemplate a specific level of market share as a condition of the sunset.

In addition, mechanisms other than structural separation will continue to exist post-sunset to forestall any efforts by BOCs to thwart competition from CLECs. Dr. Taylor correctly points out that, after BOCs are allowed entry into the interLATA long distance market, the state regulatory commissions retain full oversight over rates for access to BOC networks, the quality of wholesale service provided to CLECs, etc.[29] In addition, the complaint process remains available to competitors with valid claims against BOCs.

Dr. Taylor's Affidavit further states that "[m]arket share is not a sound predictor of future market conduct."[30] As Dr. Taylor explains, "[m]arket share reflects the market structure that has resulted from *past* actions."[31] It is no surprise that BOCs retain a high market share, given that they were the sole providers of local exchange and exchange access services until 1996. As explained by Dr. Taylor, a falling market share for the BOCs would indicate only that the local exchange market is becoming increasingly open to competition.[32] Although market share may

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[28] *Id.* at 46.

[29] *Id.* at 46.

[30] *Id.* at 47.

[31] *Id.* (emphasis in original).

[32] *Id.*

fall, if it remains at some "high" level, one cannot infer from that fact alone that the incumbent firm retains the ability to deter further competitive entry or to charge supra-competitive prices.[33]

Despite its staunch support for market share analysis in the instant proceeding, in other proceedings, AT&T has recognized the limitations of such analysis and, in fact, has argued against using such a mechanism for predicting the incumbent's market conduct.[34] As Dr. Taylor points out, Drs. Mayo and Kaserman noted on behalf of AT&T that:

> [I]nformation that, in some cases, might be contained in a market share number at a specific point in time is diluted substantially by the fact that AT&T began the post-divestiture period with an inherited high [market] share. The competitive significance of a market share number...stems from a firm's ability (or lack thereof) to retain a given market share in the wake of an attempt to raise prices to above-competitive levels.
>
> [T]he presence of a high market share at a given point in time provides no information on the incumbent firm 's vulnerability to market share losses.[35]
>
> [M]arket share is one of the economic determinants of market power, it cannot by itself demonstrate that a firm has significant control over market price. The other economic determinants, such as entry conditions, must also be conducive to providing such control.[36]
>
> It is important to understand that a firm cannot hold significant market power unless it has a large market share and other firms' supply responsiveness is low. That is either a low market share or a high responsiveness of other firms' supply to price changes means that the firm is facing effective competition. Is [sic] market share is low, significant market power cannot exist even if the responsiveness of other firms' supply to price changes is limited. Conversely,

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[33] *Id.* at 47-48.

[34] *See id.* at 50.

[35] David Kaserman and John Mayo, "Is AT&T Dominant? An Assessment of the Evidence," June 1995, Attachment to AT&T Ex Parte letter from Charles L. Ward to William C. Caton, CC Docket 79-252 at 13.

[36] *Id.* at 1 (emphasis added).

> where other firms' supply is highly responsive to price changes, an individual firm cannot possess significant market power even it holds a very high share.[37]

In his Affidavit, Dr. Taylor further points out that elsewhere AT&T has acknowledged that there is no clear theoretical or empirical link between the degree of concentration and the intensity of competition in a market.[38] According to one AT&T affiant:

> [T]he link between market concentration and market competitiveness is a tenuous one, and that measuring concentration is not a substitute for analyzing the factors that determine market performance. ... It is widely recognized that a firm's market power depends on whether rivals can supply defecting customers without significant increases in marginal cost and on whether consumers regard the products of other firms as good substitutes.[39]

A firm with a "high" market share is not automatically a monopoly, or capable of monopolizing the market in which it operates. It must also be able, and have the opportunity, to resort to predatory tactics or leverage control over essential facilities on which its downstream competitors depend. There are substantive protections in place to prohibit such behavior by BOCs. Specifically, price regulation, the continuing nondiscrimination safeguards of Section 272, and competition itself all work to preclude BOCs from engaging in anti-competitive pricing or exercising the kind of market power that AT&T and Mr. Selwyn fear from an integrated entity.

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[37] *Id.* at 14 (emphasis added).

[38] Taylor Affidavit at 52.

[39] Statement of Stanley M. Besen at 2-3, Reply Comments of American Telephone and Telegraph Company, CC Docket No. 90-132, Appendix B (Sept. 18, 1990) (footnotes omitted).

V. EXISTING REGULATIONS ARE SUFFICIENT TO PRECLUDE BOCS FROM ENGAGING IN ANTICOMPETITIVE CONDUCT.

There are more than adequate statutory and regulatory requirements that will remain in place after the Section 272 obligations expire to protect against the harms cited by some commenters. For example, the Commission's accounting rules guard against cost misallocation by requiring a BOC to account for nonregulated and regulated services separately. Whether in the presence or absence of a long distance affiliate, a BOC remains subject to the Commission's cost allocation rules. Thus, the expiration of the structural separation requirement does nothing to modify a BOC's obligation to allocate costs properly.

Moreover, existing price cap regulation precludes the type of cross-subsidization complained of by commenters such as AT&T. As SBC explains, "[c]oncerns about cross subsidization are a relic from the past: when BOCs were under rate of return regulation."[40] As the Commission has correctly noted, "because price cap regulation severs the direct link between regulated costs and prices, a carrier is not able automatically to recoup misallocated nonregulated costs by raising basic service rates, thus reducing the incentive for the BOCs to allocate nonregulated costs to regulated services."[41] Thus, after the separate affiliate requirements expire, price cap rules will continue to safeguard against cost misallocation.

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[40] SBC Comments at 13.

[41] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, CC Docket No. 96-149, *Notice of Proposed Rulemaking*, 11 FCC Rcd 18877, 18942-43, ¶ 136 (1996) (quoting *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company* Safeguards, CC Docket No. 90-623, *Report and* Order, 6 FCC Rcd7571, 7596, ¶ 55 (1991) (*"BOC Safeguards Order"*), *vacated in part and remanded sub nom. California v. FCC*, 39 F.3d 919 (9th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995)).

Furthermore, a BOC's ability to engage in predatory pricing (even in the absence of the regulatory constraints of Section 272) is highly improbable in light of the nationwide competitive presence of IXCs. As the Commission noted, it is unlikely that a BOC affiliate "could drive one or more of [the large] companies from the market," and even if it could, it is unlikely "the BOC affiliate would later be able to raise prices in order to recoup lost revenues."[42]

Commenters express concern that a BOC could use its local exchange and exchange access market power to discriminate in favor of its interLATA affiliate by providing poorer quality exchange access services to its affiliate's interLATA competitors or by unnecessarily delaying the access of such competitors to the local network.[43] However, Section 272 specifically sets forth nondiscrimination safeguards applicable to the BOC provision of in-region, interLATA telecommunications services. After the sunset, certain Section 272 nondiscrimination safeguards continue to exist and protect against the potential harms described by some commenters. Specifically, Section 272(e)(1) prohibits a BOC from discriminating against unaffiliated carriers by delaying competitors' requests for exchange service and exchange access.[44] In addition, Section 272(e)(3) requires a BOC to impute to itself an amount for access no less than that charged to interexchange carriers.[45]

Moreover, the Commission has (and will continue to have) access charge rules in place, and the BOCs are obliged to provide equal access to all interexchange carriers. There is no reason to believe that the Commission plans to eliminate these existing obligations for the

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[42] 11 FCC Rcd at 18943, ¶ 137.

[43] *See, e.g.,* Selwyn Declaration at 18.

[44] 47 U.S.C. § 272(e)(1).

[45] 47 U.S.C. § 272(e)(3).

provision of access as the BOCs enter the interexchange arena. Finally, the access charges paid by IXCs are a major source of revenue for the BOCs. Thus, BOCs have no incentive – and indeed have a significant disincentive – to jeopardize this revenue by providing inferior access, or denying it altogether, especially in light of the emergence into the access provision arena by alternative local exchange carriers and competitive access providers. Clearly, there are significant statutory and regulatory protections that will remain in place after the separate affiliate requirements sunset to guard against conduct such as cost misallocation and predatory pricing.

VI. COMMENTERS' ALLEGATIONS OF BOC ABUSE OF MARKET POWER AND DISCRIMINATION ARE WITHOUT MERIT.

Commenters such as AT&T rely on the very same arguments that were presented in various Section 271 proceedings. Now, rather than asking the Commission to deny the BOCs' request for interLATA relief, commenters claim that structural separation is necessary because BOCs are engaging in improper cost misallocation,[46] discriminating in favor of their long distance affiliates, or engaging in some other anticompetitive conduct.[47] These arguments are flawed.

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[46] AT&T Comments at 6, 21.

[47] Focal, *et al.* claims that "BOCs owe CLECs millions of dollars in unpaid charges" and cites to various proceedings involving BellSouth. Focal, *et al.* Comments at 3 & n.4. This allegation is not only irrelevant but, more importantly, completely false. All of the cases cited by Focal are reciprocal compensation cases that have been settled with the relevant complainants (with the exception of the *MCIMetro* case, which is on appeal before the 11th Circuit, *BellSouth v. MCIMetro,* No. 00-12809). This is yet another example of the grossly misleading statements made by CLECs in this proceeding.

A. BellSouth Is Not Discriminating in Favor of Its Long Distance Affiliate.

AT&T's allegation that BellSouth's Switched Access ("SWA") contract tariff violates the Section 272 nondiscrimination provisions by favoring BellSouth's long distance affiliate, BellSouth Long Distance ("BSLD"), over other interexchange carriers[48] are both confusing and incorrect. As a preliminary matter, it is unclear whether AT&T is complaining about BellSouth's federal or state switched access contract tariffs. As discussed more fully below, this distinction is important. AT&T's lack of specificity is nothing more than an attempt to hide the obvious flaws in its argument.

With respect to BellSouth's interstate SWA contract tariff, there is only a single volume-based contract arrangement in place. The Commission's rules prohibit BSLD from subscribing to the BellSouth federal SWA contract tariff until after an unaffiliated entity subscribes to that contract tariff.[49] Thus, BellSouth cannot "design" a contractual arrangement for which only BSLD could meet the terms and conditions, because an unaffiliated entity must be the first subscriber. As to the existing federal SWA contract tariff, BSLD is not a subscriber. In addition, the subscription period for this tariff has expired, thereby eliminating the ability of BSLD to become a customer. Clearly, AT&T's argument of discrimination is nothing more than a smokescreen – yet another attempt to manufacture discrimination when, in fact, none exists. AT&T's expert, Dr. Selwyn, states that he has "no specific knowledge that BellSouth Long Distance, the BellSouth Section 272 affiliate, is actually purchasing switched access services out of this contract tariff."[50] Now, AT&T has confirmation – BSLD is not subscribing to

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[48] AT&T Comments at 33; Selwyn Declaration at 56.

[49] 47 C.F.R. § 69.727(a)(2)(iii).

[50] Selwyn Declaration at 56, n.82.

BellSouth's federal SWA contract tariff. Therefore, the Commission should reject AT&T's claims of hypothetical discrimination.

In addition to the federal SWA contract tariff discussed above, BellSouth also has SWA contract tariffs in its states. These state contract tariffs are designed to retain the existing customer on, and encourage utilization of, BellSouth's switched network. Under BellSouth's state SWA contract tariffs, volume discounts are available over a five-year contract period for annual growth in switching usage compared to a specific minimum level. The specified minimum level is the carrier's projected local switching minutes (with regard to interstate interLATA traffic) for the first year of the contract based on the trend of the most recent 18 months' local switching usage prior to the beginning of the contract.

Contrary to AT&T's assertions, BSLD is not even eligible to take service under the referenced tariff. The intrastate SWA contract tariffs arise out of negotiations between BellSouth and an unaffiliated IXC. The tariffs are open to similarly situated parties for a limited period after they are filed, and require a customer that takes service under the tariff to be a BellSouth switched access customer for 18 months. BSLD does not meet these requirements. Because BSLD is not eligible to subscribe to these particular tariffs, AT&T's allegations are without merit. Thus, BellSouth is not discriminating in favor of its long distance affiliate, and there is no Section 272 violation.

B. CompTel's Assertion of Illegal Tying By BellSouth Is Without Merit.

CompTel alleges that "BellSouth's wholesale organization will not process orders for unbundled network elements ("UNEs"), the unbundled network element platform ("UNE-P"), or resale services if the UNEs or resold services would be used to provide local service to an end user customer currently obtaining long distance services from BellSouth long distance."[51] CompTel further asserts that BellSouth: (1) is using its control over UNEs and resold services to require competitors to enter into operational agreements with BellSouth Long Distance[52] and (2) is discriminating in the provision of telephone exchange service because it does not require its own retail division to negotiate an operating agreement with BellSouth long Distance.[53]

As demonstrated more fully below, CompTel has significantly misrepresented BellSouth's policy regarding fulfilling CLEC requests. CompTel states that "it is not aware of any affiliate contract between BellSouth Interconnection Services and BellSouth Long Distance that allows the former to withhold UNEs and resold services from non-affiliated local carriers to ensure payment to the latter."[54] CompTel is not aware of any such agreement, because no such agreement exists. Contrary to CompTel's allegation, BellSouth does not withhold UNEs or resold services from CLECs.

CompTel also claims that, after receiving long distance authority in Georgia and Louisiana, BellSouth conditioned the availability of UNEs and resold services on a competitor's agreeing to provide billing services for BSLD.[55] Again, CompTel is misrepresenting the

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[51] CompTel Comments at 13.

[52] *Id.*

[53] *Id.* at 14.

[54] *Id.* at 15.

[55] *Id.* at 21.

situation. BSLD does not provide its own billing. Therefore, if a CLEC end user wanted to use BSLD, that CLEC would have to provide billing.[56]

The BellSouth Carrier Notification Letter referenced by CompTel explains that CLECs must have an operational agreement with BSLD before a CLEC end user can order BSLD services. For those CLECs that inquire about these operational agreements, BellSouth provides the relevant contact information for BSLD. In addition, contrary to CompTel's claim, BellSouth and BSLD do have comparable operational agreements in place.[57]

As BSLD has explained, customer-related and business-related arrangements must be in place before an IXC can provide its services to end users.[58] Any IXC, including BSLD, must negotiate the necessary business arrangements that will allow it to provide its service to end users. These arrangements include negotiating the carrier-to-carrier transfer of back office information that allows a customer to select the IXC, set up an account, and receive a bill for the service provided. The IXC must also negotiate acceptable terms for the LEC/CLEC to carry its traffic and assess access charges. For LECs and CLECs who utilize their own switches, the IXC also must ask to have its Carrier Identification Code ("CIC") loaded. Without the IXC's CIC in place, end users of switch-based CLECs would be unable to complete calls over the IXC's network. These arrangements, for the most part, are negotiated with each LEC and CLEC on an individual company basis.

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[56] A number of carriers do not provide their own billing for various business reasons. As a result, these carriers use the billing services of other carriers or billing entities. For example, BellSouth provides billing and collection services to a number of IXCs pursuant to tariff.

[57] *See* CompTel Comments at 14. The various agreements between BellSouth and BSLD can be found at http://bellsouthcorp.com/policy/transactions.

Not surprisingly, a new entrant IXC must devote time and resources to evaluate the business and technical requirements presented by a diverse universe of CLECs, and it must protect itself against unauthorized use of its facilities before and after these negotiations are completed. BSLD, as essentially a new entrant into the retail interexchange market and as a separate affiliate operating under the Act's Section 272 requirements and receiving its BOC affiliate's services pursuant to that section, does not have in place the same extensive back office systems and billing capabilities as large, well established carriers. So far, BSLD has found that most CLECs cannot or do not make available to IXCs the broad range of services needed by BSLD to provide service to the end users of those CLECs. For example, BSLD has found that many CLECs do not offer Billing and Collection services. Because BSLD currently has no internal, standalone retail billing and collection capability of its own (it obtains Billing and Collection services from BST for BellSouth residential and small business end users), BSLD must find alternate solutions for rendering bills and making collections from CLEC end users. Further, when BSLD considered using its existing clearinghouse vendor, it found that many (if not most) CLECs do not have standing arrangements with this vendor. Such circumstances require BSLD to evaluate other options.

Early on, BSLD took steps to insure that it would not inadvertently be placed into the interexchange carrier business prior to the relevant Section 272 authorization. Post-authorization, it is just as important that BSLD not be assigned customers for whom it cannot provide adequate service. As a result, BSLD does not accept customers of a CLEC unless it has

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[58] Affidavit of Mary M. Dennis, Attachment to Reply in Support of Application by BellSouth for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina, WC Docket No. 02-150 (filed Aug. 5, 2002).

executed an operational agreement with that CLEC, and it has insured that all necessary arrangements are in place.

Now that BellSouth has received long distance relief in two states, BSLD welcomes the opportunity to compete in the long distance market where it is authorized to do so, and is working with CLECs to establish arrangements in order to provide services to the CLECs' end users. BSLD is continuing to review the business and technical requirements to support the provision of its services to CLEC end users. BSLD must create a variety of new processes to enable it to serve these end users. Some of these new processes can be put into place sooner than others. In the interim, BSLD must continue to restrict the provision of its services to end users who can actually be served by BSLD. When BSLD has the necessary arrangements in place to serve the end users of CLECs, it will do so.

As demonstrated above, CompTel's allegations that BellSouth is engaging in illegal tying arrangements are flawed. Consequently, the Commission must not afford any weight to these erroneous claims in determining whether or not to allow the Section 272 obligations to sunset.

VII. CONCLUSION

The record clearly establishes that there is no compelling justification for delaying the expiration of the structural separation and nondiscrimination obligations of Section 272. Given the statutory presumption that the separate affiliate requirements will expire after a three-year period, the Commission should allow these requirements to sunset on a BOC-by-BOC basis as contemplated by Congress. Moreover, the Commission should not adopt additional regulation as part of the Section 272 framework. Mandating performance measures for special access or UNEs as a condition of, or in lieu of, Section 272 compliance would exceed the scope of the Act.

In addition, requiring BOCs to prove that they lack market power as a prerequisite to the sunset is beyond the scope of Section 272. For all the foregoing reasons, BellSouth respectfully urges the Commission to allow all of the relevant structural separation and other Section 272 requirements to sunset three years after a BOC obtains authority to provide in-region, interLATA telecommunications services in its first state.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this 26th day of August 2002 served the following parties to this action with a copy of the foregoing **REPLY COMMENTS OF BELLSOUTH CORPORATION** by electronic filing and/or by placing a copy of the same in the United States Mail, addressed to the parties listed on the attached service list.

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